Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Telecommunications Services	)	CS Docket No. 95-184
Inside Wiring	)	
	)	
Customer Premises Equipment	)	

REPLY COMMENTS OF ECHELON CORPORATION

Glenn B. Manishin
Blumenfeld & Cohen - Technology Law Group
1615 M Street, N.W. , Suite 700
Washington, DC 20036
202.955.6300
202.955.6460 fax

Counsel for Echelon Corporation

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SUMMARY

The docket concerns possible revisions to the Commission's cable television "inside wiring" rules and policies to reflect "today's evolving and converging marketplace." Unfortunately, two commenters have sought improperly to broaden the Commission's NPRM to include proposals for immediate adoption of an incomplete, contested standard for "cable equipment compatibility"—the so-called "Decoder Interface"—as a purported means of implementing the "commercial availability" provisions of Section 304 the Telecommunications Act of 1996.

These proposals are unfair, unwise and unlawful. Adopting them would deprive affected entities of fair administrative notice, harm cable subscribers and conflict with Commission policy, and evade Congress' express intent in the 1996 Act. Section 301(f) of the Act fundamentally restricts the Commission's authority over cable equipment standards, and thus the Decoder Interface, by requiring that the FCC "maximize competition" and ensure that any standard does "not affect" features, products or markets other than cable programming. To resurrect the Decoder Interface under the guise of commercial availability, without adhering to the more limited FCC powers over cable equipment compatibility, is a subterfuge. The proposals are "old wine in new bottles," and improperly exalt form over substance.

There is absolutely nothing in the legislative record even remotely suggesting that Congress intended the Commission to implement Sections 304 or 301(f) of the 1996 Act as an "ancillary" portion of a rulemaking devoted to inside wiring policies and rules. Doing so would violate the most basic requirements of administrative notice and fairness. Furthermore, adopting the interim Decoder Interface standard would be bad

policy, not only because the Commission is still "awaiting finalization" of the proposal from the C3AG Committee, but also because the proposal is *incompatible* with the installed base of *all* existing TVs and VCRs—thus requiring consumer expenditures on the order of $150 billion or more—as well as current and forthcoming digital video transmission and encryption standards, including DSS.

The Commission has enough complexities on its inside wiring agenda without addition of these extraneous, and controversial, issues. The Commission has yet to complete (or schedule completion of) its *Cable Compatibility Rulemaking*, ET Docket No. 93-7, despite Congress' express directive that the FCC "promptly complete its pending rulemaking on cable equipment compatibility." The Act plainly requires the Commission to examine commercial availability *and* cable compatibility from a fresh perspective, in consultation with both industry and private standards-setting bodies, in order to meet its new statutory obligations. Thus, even without regard to their substantive defects, the proposals for Commission adoption of a draft, interim cable equipment standard in this proceeding are premature, irrelevant to inside wiring policy, and an inappropriate "end run" around the 1996 Act's specific mandates that should be rejected.

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Echelon Corporation ("Echelon"), by its attorneys, respectfully submits these reply comments on the Notice of Proposed Rulemaking ("NPRM")[1] released by the Federal Communications Commission ("Commission" or "FCC") in this proceeding.

INTRODUCTION

The Commission's focus in this docket is on proposed revisions of its cable television "inside wiring" rules and policies to reflect "today's evolving and converging marketplace." NPRM ¶ 1. The issues presented are difficult and controversial, including constitutional questions about cable operators' property rights, policy questions about regulatory parity between telephone and cable inside wiring policies in an era where integrated "telephony, data and video programming services" may soon be offered by both telecommunications carriers and cable systems, *id.* ¶ 2, and technical questions about the extent to which wiring rules can or should vary "according to the technical characteristics of the service." *Id.* ¶ 4.

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[1] *Telecommunications Services, Inside Wiring, Customer Premises Equipment*, Notice of Proposed Rulemaking, FCC 95-504, CS Docket No. 95-194 (released Jan. 26, 1996)("NPRM").

Unfortunately, some commenters have sought improperly to broaden the Commission's NPRM to include proposals for immediate adoption of an incomplete, contested standard for "cable equipment compatibility" being examined in another Commission rulemaking, ET Docket No. 93-7. Although the NPRM—adopted and released before enactment of the Telecommunications Act of 1996 (the "1996 Act")[2]—sought comment on "how best to protect against theft of cable service or other damage to cable operators' facilities," NPRM ¶ 72, it understandably did not solicit comment on or propose rules for implementation of the 1996 Act. Nonetheless, two parties now ask the Commission to bundle into this proceeding the unrelated, draft standard for cable equipment compatibility as a purported means of implementing the "commercial availability" provisions of Section 304 the 1996 Act.[3]

These proposals are unfair, unwise and unlawful. The Commission has enough on its inside wiring agenda without addition of these extraneous, and controversial, issues. Adopting the proposals would deprive affected entities of fair administrative notice, harm cable subscribers and conflict with Commission policy, and evade Congress' express intent in the 1996 Act. It would also be grossly premature, not only because the Commission is still "awaiting finalization of a standard for a Decoder Interface connector," NPRM ¶ 72, but also because Section 301(f) of the Act significantly modifies the Commission's authority over cable equipment standards, and thus the Decoder Interface. Furthermore, the Act plainly requires the Commission to examine

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[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996)(to be codified at 47 U.S.C. § 151 *et seq.*).

[3] Comments of the Consumer Electronics Manufacturers Association ("CEMA"), at 13-15; Comments of Circuit City Stores, Inc. ("Circuit City"), at 8-9, 15-17.

commercial availability *and* cable compatibility from a fresh perspective, in consultation with both industry and private standards-setting bodies, in order to meet the Commission's new obligations. In short, the proposals for Commission adoption of the so-called "Decoder Interface" in this proceeding—even without regard to their substantive defects—are irrelevant to inside wiring policy and an inappropriate "end run" around the 1996 Act's specific mandates that should be rejected.

DISCUSSION

I. ADOPTION OF THE DECODER INTERFACE IN THIS PROCEEDING WOULD BE FUNDAMENTALLY UNFAIR AND PROCEDURALLY IMPROPER

The Commission's consideration of cable equipment compatibility arose under Section 17 of the 1992 Cable Act, which required the FCC, among other things, to "ensure" compatibility of television receivers, video cassette recorders ("VCRs") and cable converters (or "set-top boxes") in order to eliminate the common inability of cable subscribers to watch one "scrambled" cable channel while recording another and utilize advanced TV display features, such as "picture-in-picture."[4] As part of that process, the Cable Consumer Electronics Compatibility Advisory Group ("C3AG"), a joint working group of the National Cable Television Association ("NCTA") and the Consumer Electronics Group of the Electronics Industries Association (now known as the Consumer Electronics Manufacturers Association ("CEMA")), proposed that the Commission adopt the "Decoder Interface"—a new physical connection and

[4] 47 U.S.C. § 544a.

communications protocol—under which many current cable set-top functionalities would be integrated into TV sets and VCRs.

Both the C3AG and the Commission's *Cable Compatibility Rulemaking*, ET Docket No. 93-7, have essentially been stagnant since the Commission's May 1994 *First Report and Order*.[5] Development of the Decoder Interface standard—also known as "IS-105" by reference to its draft CEMA designation—has been stalled, and the C3AG has not submitted either a status report or updated standards proposal in Docket 93-7 since it formally proposed the Decoder Interface in August 1994.[6] Significant disputes have subsequently emerged between NCTA and CEMA over the scope of the standard and its impact on cable programming services.[7] With the exception of a brief *Reconsideration Order*,[8] the Commission has neither proposed long-term cable equipment compatibility regulations nor ordered a completion date for the IS-105 negotiations, despite its tentative decision to adopt the Decoder Interface "if the new standard is available in

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[5] *Implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992—Compatibility Between Cable Systems and Consumer Electronic Equipment*, First Report and Order, 9 FCC Rcd. 1981 (1994)*("First Report and Order")*.

[6] Cable-Consumer Electronics Advisory Group Proposal for the Decoder Interface Standard, ET Docket No. 93-7 (filed Aug. 15, 1994); *see* Letter from Jeffrey A. Campbell to William F. Caton, Aug. 15, 1994 (forwarding C3AG Proposal).; Proposal of the Consumer Electronics Group of the Electronics Industries Association for a Decoder Interface Standard, ET Docket No. 93-7 (filed Aug. 15, 1994)("EIA/CEG Decoder Interface Proposal"). The C3AG committed to "report to the FCC on the status" of its standards activities by December 31, 1994. C3AG Proposal, at 1. No such report was filed.

[7] *Compare* Statement of the Consumer Electronics Group of the Electronics Industries Association Regarding the Decoder Interface, ET Docket No. 93-7 (filed Feb. 3, 1995), *with* Letter from Daniel L. Brenner and Wendell H. Bailey, NCTA, to Richard M. Smith, FCC, Feb. 13, 1995. CEMA (EIA/CEG) insisted in response that "at present there is no complete proposal for a Decoder Interface pending before the Commission. NCTA would have the Commission seek comment solely on the incomplete, draft IS-105 standard originally submitted by the C3AG. . . . The incomplete, draft IS-105 no longer has the support of the C3AG." Letter from Joseph P. Markoski to Richard M. Smith, FCC, March 9, 1995.

[8] *Implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992—Compatibility Between Cable Systems and Consumer Electronic Equipment*, Memorandum Opinion and Order, ET Docket No. 93-7, FCC 96-129 (released April 10, 1996).

sufficient time for us to obtain comment on it before we complete our decision in this matter."[9]

Responding to these delays, Congress addressed cable equipment in two different portions of the 1996 Act, both of which were fiercely contested legislatively. First, Section 301(f) of the Act, which originated in the House bill, limits the Commission's cable equipment compatibility authority by requiring the FCC (1) to achieve compatibility with "narrow technical standards," (2) to "maximize competition" for all "features, functions [and] protocols" of set-top boxes, and (3) to craft compatibility rules that "do not affect . . . telecommunications interface equipment, home automation communications, and computer network services." Second, Section 304 of the Act, which also originated in the House bill but was initially defeated in the Senate floor vote on S.652, requires the Commission to "assure the commercial availability" of converter boxes from "unaffiliated" vendors, while protecting cable and video programming security. Although Section 304 does not set a deadline for Commission action, Section 301(f) did not modify the existing—and by now long passed—deadline for cable compatibility rules in the 1992 Cable Act. Indeed, the Conference Committee Report specifically directed the Commission to "promptly complete its pending rulemaking on cable equipment compatibility."[10]

Against this backdrop, it would be fundamentally unfair, and clearly inconsistent with Congress' desire that the FCC fashion newly formulated rules for *both* cable

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[9] *Implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992—Compatibility Between Cable Systems and Consumer Electronic Equipment,* Notice of Proposed Rulemaking, 8 FCC Rcd. 8495, 8499 (1993).

[10] *Joint Explanatory Statement of the Committee on Conference,* H. Rep. No. 104-458, 104th Cong., 2d Sess. 170 (1996)("Conference Report").

equipment compatibility under Section 301(f) and commercial availability under Section 304, for the FCC to enlarge the current proceeding to address either of these new legislative mandates. As a procedural matter, there is nothing in the NPRM indicating that the Commission would consider in this docket proposing, revising or adopting rules for either cable equipment compatibility or commercial availability. Indeed, customer premises equipment ("CPE") rules are not even mentioned as an "objective" of this docket (NPRM ¶ 79), and the NPRM's discussion of CPE issues in ¶¶ 70-76 gives not a clue that the FCC anticipated promulgating either cable equipment compatibility or commercial availability regulations. The CPE issues set out for comment all concern "harmonizing or revising [current FCC] rules to accommodate better the possible convergence of technologies used to receive and interact with network-delivered video programming and telephony." NPRM ¶ 71.

It is a black-letter principle that an administrative agency must give fair notice of proposed regulations, in order to permit interested and potentially affected parties the opportunity to comment. Because the NPRM was adopted and released *before* passage of the 1996 Act, the Commission in this proceeding obviously has not met the Administrative Procedure Act requirements for implementation of either Section 301(f) or Section 304. Although the Commission notes that the Decoder Interface is "awaiting finalization" and asks for comment on how to protect cable programming security in a manner "consistent with these efforts," NPRM ¶ 72, it does not propose adoption of all or any part of the draft Decoder Interface standard. Consequently, the suggestions that the Commission in this docket should "adopt the Decoder Interface as a necessary

component of any connector standard it ultimately adopts for analog set-top boxes,"[11] or adopt "[a]n interface for a descrambler-only module [that] has been defined as part of the draft EIA IS-105 standard,"[12] violate the fundamental requirements of administrative notice and fairness.

These proposals are also unfair in a different sense, in that they would circumvent the will of Congress. The cable equipment compatibility provisions of the 1992 Cable Act required the Commission to "ensure" compatibility for both technical equipment functions and commercial availability of set-top boxes. Yet as a consequence of the long delay in meeting the 1992 Act's commands, the Commission's tentative conclusions in Docket 93-7 were overridden with two specific legislative mandates, both of which substantially alter the scope of the Commission's responsibilities and powers.

There is absolutely nothing in the legislative record even remotely suggesting that Congress intended the Commission to implement Sections 304 or 301(f) of the 1996 Act as an "ancillary" portion of a rulemaking devoted to inside wiring policies and rules. To the contrary, as discussed in Section III, there is clear evidence that Congress intended the Commission to utilize separate rulemakings for these issues, in which they would receive the attention—and wide input from all affected industries—merited for such controversial and technically difficult matters. Accepting the proposals to convert the present inside wiring rulemaking into a proceeding on cable CPE standards would impermissibly enlist the Commission in a subterfuge that thwarts the intent of Congress and does fatal violence to the separate and reasoned consideration Congress mandated

[11] CEMA Comments at 15.
[12] Circuit City Comments at 16.

for the important issues of cable equipment compatibility and commercial set-top box availability.

II. ADOPTING THE DECODER INTERFACE WOULD HARM CONSUMERS AND CONFLICT WITH THE COMMISSION'S POLICY OBJECTIVE OF FACILITATING "CONVERGENCE" OF CPE TECHNOLOGIES

Accepting the proposals for enlarging this proceeding beyond inside wiring policies to include cable and other "set-top" compatibility issues would be extremely unwise as a policy matter. The draft IS-105 Decoder Interface standard is the product—not yet completed—of the consumer electronics and cable television industries, only two of the constituencies that will be affected by the revolutionary changes now reshaping the communications marketplace. The C3AG draft standard serves the interests of its proponents, but harms consumers and forecloses competition for home automation communications, computer networks and the very sorts of "enhanced," integrated interface equipment that the Commission envisions will be developed in the converging communications CPE market. NPRM ¶ 69.

Merely describing the issues left unaddressed in this proceeding by the advocates of the Decoder Interface demonstrates the ill-advised course these parties urge the Commission to pursue. *First,* the Decoder Interface requires use of a new physical connector and communications protocol for TVs, VCRs and other consumer electronics products. As such, it is by definition *incompatible* with the installed base of *all* existing TVs and VCRs. Thus, in order to achieve the compatibility and commercial availability benefits urged as its objective, the Decoder Interface would necessitate the *replacement of more than 200 million TVs and VCRs used today by American consumers,* at a retail cost approaching $150,000,000,000 ($150 billion) or greater.

Second, the Decoder Interface is an analog-only standard. As a result, it is incompatible with all forms of digital video transmission and encryption, including both current Direct Satellite Services ("DSS") and the Advanced Television ("ATV") digital standards under Commission consideration for High-Definition Television. At the same time that the FCC is endeavoring to facilitate the "digital revolution" in order to bring the benefits of high-capacity video programming services to consumers, the Decoder Interface would thus leave consumers in a virtual "wasteland" of obsolete analog video as the transition to digital transmission begins in earnest over the next few years. Particularly given the extremely long life cycles of TVs and VCRs, many of which are used by consumers for a decade or more before replacement, the Decoder Interface would result in substantial equipment obsolescence, "stranded plant," for cable television subscribers.

Third, the Decoder Interface embodies a so-called "set-back" architecture—replacing the omnipresent set-top converters with component descrambler modules that attach to the back of TVs and VCRs—that is incompatible with current and projected market trends in video interface equipment. For instance, interactive video services, including the SEGA Channel and other video game programming services, as well as new telephone company video ventures such as Tele-TV, all now use or plan to deploy set-top devices for both security ("conditional access") and feature selection functions. The Decoder Interface thus advances the interests of TV and VCR manufacturers and retailers, because it requires more functionality (and profit) to be incorporated into their products, but does little or nothing to meet the legitimate needs of video consumers.

Fourth, the Decoder Interface discriminates against potentially competing technologies in favor of cable television services. Instead of being designed to resolve the 1992 Cable Act's limited set of cable equipment incompatibilities (watch-and-record, picture-in-picture, etc.), the Decoder Interface includes a wide-ranging protocol, command set and features that are optimized for cable television programming and cable systems. Yet as a consequence, many of the technical features of the draft standard—including data transmission rate, inter-device communications, and others—are inconsistent with the needs of other industries that will undoubtedly play a major role in the emerging video marketplace. These include the computer industry, where "PC-TV" is rapidly becoming a realistic option for consumers,[13] as well as local exchange carrier efforts to deliver video programming via the public switched telephone network and new wireless services. As Bell Atlantic advised the Commission nearly a year ago, the Decoder Interface artificially positions the TV set as the "gatekeeper" to the integrated, broadband "information superhighway" of the future.[14]

Fifth, the Decoder Interface unnecessarily interferes with competition in another emerging technology, home automation. As the developer of the most widely used, open technology for home automation communications, Echelon has a keen interest in ensuring that the selection of "winners" in this new marketplace occurs as a result of competition, not government standardization. Yet the Decoder Interface incorporates

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[13] *See* "Andy Grove's Dream: To Make Your PC More Important Than Your TV," Fortune, July 10, 1995.

[14] Bell Atlantic Ex Parte Presentation, ET Docket No. 93-7, Slide 7 (May 31, 1995). The Commission has also recognized this problem. "[W]e also appreciate that [the Decoder Interface] could constitute a gateway that constrains the development of new technologies. Moreover, the potential for such a constraining effect is substantially greater in the current period, where there is rapid development of new communications technologies and services that are distinctly different from those available in the

(Footnote continued on next page)

large elements of a CEMA-sponsored home automation standard,[15] which is *only one of a number of rival technologies competing to automate American homes for lighting, security, entertainment and related functions.*[16]

The Commission has correctly envisioned that as the telephone, video and data communications markets converge, consumers may well choose to replace several different forms of telecommunications interface equipment with a single, multi-purpose piece of CPE—the "all-in-one" set-top box. NPRM ¶ 69. While it is true, as the NPRM observes, that differential regulatory schemes could create market and consumer uncertainty, and thus impede this convergence, *id.*, the Decoder Interface flatly contradicts the Commission's premise. Instead of leaving the features, functions and capabilities of set-top devices to the marketplace, the Decoder Interface incorporates a wide range of standardized functionalities that are unnecessary for either cable equipment compatibility or commercial availability, and that will therefore necessarily affect competition in this emerging, "converging" marketplace. If the Commission's objective is to "tailor [its] rules to accommodate different types of CPE technologies and functions," *id.* ¶ 72, the Decoder Interface would defeat that goal by effectively "locking out" non-cable technologies.

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past." *First Report and Order*, 9 FCC Rcd. at 1987.

[15] "The Decoder Interface message protocol is defined by EIA IS-60. IS-60 is a home automation standard developed over a period of eight years and designed to support the present and future needs of a wide spectrum of consumer products." EIA/CEG Decoder Interface Proposal, at 8.

[16] *See* Comments of Compaq Computer Corporation, at 4-5 & n.3. Although Compaq has purchased an equity interest in the largest manufacturer of the patented equipment required for use of CEMA's "CEBus" home automation standard, Compaq correctly does not propose that the Commission adopt the Decoder Interface as part of this docket. *See id.* at 20-23 (cable CPE unbundling), 32-34 (cable modem interoperability standards).

III. ADOPTING THE DECODER INTERFACE IN THE INSIDE WIRING PROCEEDING WOULD BE UNLAWFUL UNDER THE TELECOMMUNICATIONS ACT OF 1996

In their haste to propose premature Commission adoption of the Decoder Interface in this proceeding, those commenters urging expansion of the inside wiring docket into cable equipment compatibility and commercial availability assert that Section 304 of the 1996 Act gives the FCC the power to adopt the Decoder Interface standard and overrides the specific cable standards-setting limitations imposed by Section 301(f) of the Act. These contentions are erroneous.

CEMA and Circuit City both argue that the IS-105 standard—apparently as currently configured in interim, draft mode—is consistent with Section 301(f) of the Act. Yet Section 301(f) markedly changes the scope of the Commission's authority over cable CPE standards. Not only does this provision specify that the 1992 Cable Act must be implemented with "narrow technical standards that mandate a minimum degree of common design and operation"—by adding an express Congressional "finding" to what is now Section 624A of the Communications Act—but it requires the Commission, as its first order of business, to consider:

> the need to maximize open competition in the market for all features, functions, protocols, and other product and service options of converter boxes and other cable converters unrelated to the descrambling or decryption of cable television signals.

47 U.S.C. § 544a(c)(1)(A). Section 301(f) also specifically limits the Commission's cable equipment compatibility role by requiring that the FCC:

> ensure that any standards or regulations developed under the authority of [Section 624A] to ensure compatibility between televisions, video cassette recorders, and cable systems *do not affect features, functions, protocols, and other product and service options* other than those [such as picture-in-picture, etc.] specified in paragraph

(1)(B), *including telecommunications interface equipment, home automation communications, and computer network services.*

47 U.S.C. § 544a(c)(2)(D)(emphasis supplied).

The purpose of this provision, as explained in the House Report, is "to maximize the rate of competition and avoid unnecessary government intervention in the area of cable television equipment."[17] Section 301(f) "directs the Commission to set only minimal standards to assure compatibility" and "ensure[s] that Commission efforts with respect to cable compatibility do not affect unrelated markets, such as computers or home automation, or result in a preference for one home automation protocol over another."[18] It is included in the 1996 Act unchanged from the House bill. The Conference Committee, in turn, emphasized that the Commission's compatibility powers under the 1992 Cable Act were narrowed in order to avoid "the risk that premature or overbroad Government standards may interfere in the market-driven process of standardization in technology intensive markets."[19]

It is not possible for the Commission to adopt the Decoder Interface, developed by the C3AG in the context of the *Cable Compatibility Rulemaking,* in the aftermath of Section 301(f). CEMA maintains that "IS-105 is fully consistent with" this provision,[20] but cannot explain how a standard that incorporates its own home automation protocol and command set language does not "affect" home automation products or "result in a preference for one home automation protocol over another." In fact, CEMA was a vocal opponent of Section 301(f), complaining in the *Washington Post* that the provision "stops

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[17] H. Rep. No. 104-204, 104th Cong., 1st Sess. 111 (1995).
[18] *Id.*
[19] Conference Report at 170-71.
[20] CEMA Comments at 15 n.28.

the FCC from creating a free and open compatibility between TV sets and cable."[21] CEMA's counsel opined in *Legal Times* that "because the language of [Section 301(f)] is vague at best, it is impossible to predict with precision what effect it would have."[22] And CEMA's own analysis of the 1996 Act, noting that Section 301(f) "remains in tact [sic] as passed by the House Commerce Committee," concludes definitively that "[t]he provision has a potentially chilling—if not deadly—effect on the current Decoder Interface negotiations to allow for compatibility among TVs, VCRs, and cable systems."[23]

Circuit City argues that the Commission can use the Decoder Interface as a "tool" for implementing Section 304's commercial availability requirement by "ma[king] use of the standards work done in the private sector pursuant to ET Docket 93-7."[24] But the Decoder Interface is the product of the C3AG, a group (as its very name demonstrates) that was formed specifically to implement cable equipment compatibility under the 1992 Cable Act, and even CEMA concedes that IS-105 is designed to "provide compatibility between consumer electronics equipment and analog cable service."[25] Circuit City's curious argument that adoption of portions of the Decoder Interface is permissible because doing so would not "entail any judgment, decision, or action" in Docket 93-7, "or other issues or elements of draft standards that relate to it,"[26] is not sensible. Congress affirmatively restructured the Commission's authority over cable

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[21] *See* Exhibit A.

[22] Matthew J. McCoy, "Getting Cable-Ready: Telecom Bills Would Stop FCC Standard That Consumers Need," *Legal Times*, Nov. 27, 1995, at 23.

[23] *See* Exhibit B.

[24] Circuit City Comments at 16.

[25] CEMA Comments at 14.

[26] Circuit City Comments at 16.

equipment issues in Section 301(f). To resurrect the Decoder Interface under the guise of commercial availability, without adhering to the more limited FCC powers over cable equipment compatibility, is a subterfuge.[27] An agency cannot properly adopt a rule, proposed for one purpose, in a different proceeding as a vehicle for evading express Congressional limitations on its rulemaking authority. The proposal is "old wine in new bottles," and improperly exalts form over substance.

Whether or not Circuit City is correct that Section 304 is not subject to the limitations of Section 301(f) is irrelevant. *See* Circuit City Comments at 16-17. First, Section 304 of the 1996 Act requires that the Commission undertake specific procedural steps prior to promulgating commercial availability regulations, including "consultation with appropriate standards-setting organizations." 47 U.S.C. § 629(a). The Conference Report directs the FCC to "take cognizance of the current state of the marketplace and consider the results of private standards setting activities."[28] The Commission has not yet satisfied these requirements, so the proposal is facially premature. Second, Circuit City insists that Section 304 can be implemented in *any* Commission rulemaking. Yet Section 304 requires the Commission to "adopt regulations," a clear statutory reference to an on-the-record rulemaking, and there is certainly nothing suggesting that Congress intended the FCC to incorporate commercial

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[27] To its credit, Circuit City appears to concede that the Decoder Interface would contravene the limitations of Section 301(f) designed to protect the home automation and computer industries, in that it proposes adoption of only a portion of the draft standard, namely "a security module and interface." *Id.* at 21. Although the premise that a security module and interface would not "affect" home automation is incorrect, Circuit City does not corroborate CEMA's assertion that the Decoder Interface is "fully consistent" with the 1996 Act. In any event, however, the current 26-pin connector specified in the draft IS-105 proposal clearly exceeds that needed for the simple application of a component descrambler module, and is thus far beyond Section 301(f)'s limitation of Commission cable standards to the "minimum degree of common design and operation" necessary for equipment compatibility.

[28] Conference Report at 181.

availability regulations into a proposed rulemaking, initiated before passage of the 1996 Act, on the very different subject of inside wiring.

Third, Circuit City contends that "Section 304 recognizes explicitly that the Commission will be engaging in standards-setting to comply with the law."[29] This is incorrect. Section 304 provides the Commission with no explicit standards-setting authority. To the contrary, the provision's "consultation" language requires that the Commission defer to voluntary, private industry standards wherever possible, in order to "avoid actions which could have the effect of freezing or chilling the development of new technologies and services."[30] Unless and until the Commission can demonstrate that the "current state of the marketplace" requires a governmental standard, equipment standards under Section 304 are to be left to "private standard-setting organizations . . . and other appropriate bodies."[31]

The Senate consideration of Section 304 is highly instructive. Not only was the original provision overwhelmingly defeated when opponents objected that it would necessarily lead to mandatory FCC standards,[32] but the Senate debate on the modified Conference bill included a colloquy directly addressing the Commission's standards authority *and* the relation of commercial availability to Section 301(f)—the "Eshoo amendment."[33]

> Mr. FAIRCLOTH. The competitive availability of navigation devices provision, section 304, instructs the FCC to consult with appropriate voluntary industry standards setting organizations for

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[29] Circuit City Comments at 19.

[30] Conference Report at 181.

[31] *Id.*

[32] 141 Cong. Rec. S7993, S7997 (remarks of Sen. Pressler), S7995 (remarks of Sen. Helms), S8000 (remarks of Sen. Ford) (daily ed. June 8, 1995).

[33] 142 Cong. Rec. S700 (daily ed. Feb. 1, 1996).

> the purpose of promulgating a regulation. Given that the FCC is not a standards setting organization, do you agree that this legislation does not authorize the FCC to set a standard for interactive video equipment?
>
> Mr. BURNS. I agree. Moreover, FCC involvement in the emerging digital market could have the effect of freezing or chilling that market. If private groups are able to develop sufficient standards on their own, there is no need to the FCC to intervene. One such example of this is the so-called Eshoo amendment, which leaves the development of "features, functions, protocols, and other product and service options" for analog cable equipment to the private sector.

In other words, both Section 304 and Section 301(f) embody the same preference for voluntary, private industry standards, and both seek to prevent premature or overbroad government standards from chilling technological development in the rapidly evolving communications equipment marketplace.

In this light, the Commission cannot seriously entertain the proposals for adoption of the Decoder Interface as an "inside wiring" rule in this proceeding. The better course, one consistent with the legislative mandate, is for the FCC to first reassess the Decoder Interface as part of ET Docket No. 93-7, engage in necessary consultation and market study of commercial availability under Section 304, and then initiate a separate commercial availability rulemaking to implement Section 304. The Commission's publicly released schedule for implementing the 1996 Act correctly charts this course, indicating that an NPRM under Section 304 will be released by June 1996.[34]

Ironically, despite the absence of any deadline for a commercial availability rulemaking in the 1996 Act, and the Conference Committee's directive that the FCC

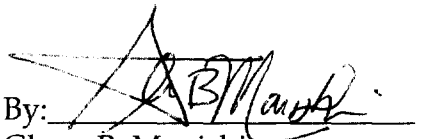
[34] Draft FCC Implementation Schedule for S.652, "Telecommunications Act of 1996," at 32.

"promptly complete its pending rulemaking on cable equipment compatibility," Conference Report at 170, the Commission's implementation schedule does not indicate any contemplated action on cable equipment in ET Docket No. 93-7. Echelon expects that this was simply an administrative oversight, and stands ready to work with the Commission on restructuring its cable equipment compatibility rules to meet the new requirements of the "Eshoo amendment."

CONCLUSION

The proposals for extending this proceeding to encompass standards for commercial availability under Section 304 of the 1996 Act, and for immediate Commission adoption of the draft IS-105 Decoder Interface standard, are unfair, unwise and unlawful. The Commission should limit this proceeding to inside wiring issues, promptly reassess the Decoder Interface under the new limits of Section 301(f) of the Act in ET Docket No. 93-7, and then initiate a separate commercial availability rulemaking to implement Section 304.

Respectfully submitted,

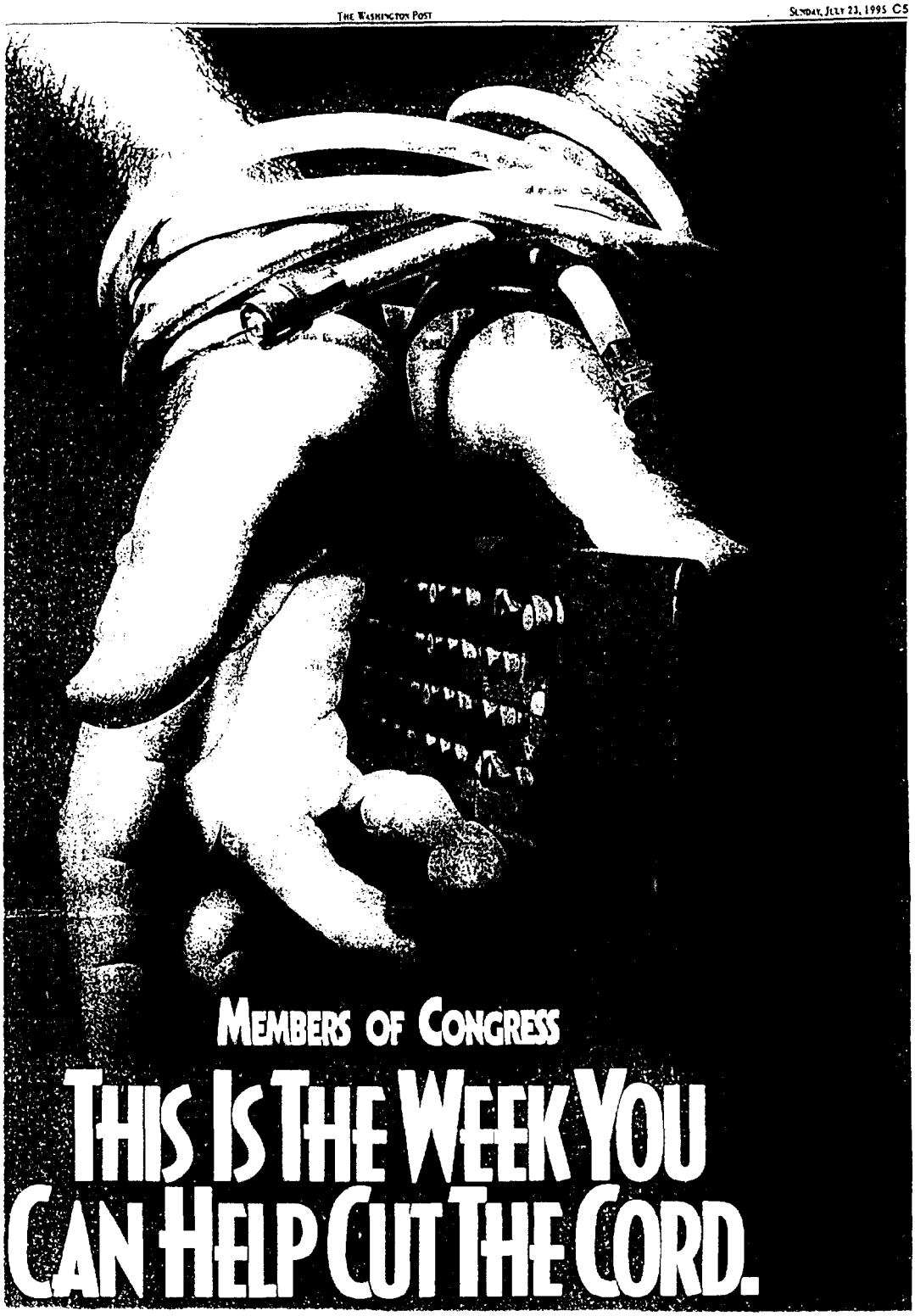


By: _____
Glenn B. Manishin
Blumenfeld & Cohen - Technology Law Group
1615 M Street, N.W. , Suite 700
Washington, DC 20036
202.955.6300
202.955.6460 fax

Counsel for Echelon Corporation

Dated: April 17, 1996

EXHIBIT A



MEMBERS OF CONGRESS

THIS IS THE WEEK YOU CAN HELP CUT THE CORD.

What a drag.

A consumer buys a new TV. Invests in a VCR. Subscribes to a cable television. Then realizes that her cable system is making it impossible for all that great technology to work together.

Members of Congress, please vote "NO" on the provision to the Telecommunications Act that will make sure TV sets are forever disabled by the cable monopoly.

The Scramble to Unscramble Cable TV

Many cable systems scramble all signals, even local broadcasts. Some insist subscribers use company-provided converter boxes to descramble their signals—only one channel at a time.

Result? Consumers can't tape one channel while watching another. They can't tape two consecutive programs on different channels. Those special picture-within-a-picture sets won't work.

Now Is the Time to Be Plugged In

Members of Congress: In the next few days, you will vote on legislation to undo protections against these types of abuses by the cable television industry. Three years ago, Congress passed legislation to require that cable system signals be compatible with TV and VCR features. The bill passed easily.

But it's about to be undone. Congresswoman Eshoo (D-Calif.) wants to make sure that a company in her district can sell a patented system. She sponsored a provision to the Telecommunications Act which stops the FCC from creating a free and open compatibility between TV sets and cable. The cable industry is abandoning consumers and supporting this bill so more boxes will have to be installed.

The Eshoo Provision would:

- Add up to 20% to the cost of a TV set.
- Promote incompatibility between TVs, VCRs and Cable.

Don't Let Cable Control TVs

If you believe it's time to require cable systems to allow consumers to use their TVs, their VCRs and their remotes, IT'S TIME TO VOTE AGAINST THE ESHOO PROVISION.

DON'T LET CABLE DISABLE

The Electronic Industries Association / TV Set and VCR Manufacturers / Home Recording Rights Coalition / Consumer Electronics Group / National Society of Certified Electronics Technicians / National Electronic Sales and Service Dealers Association / North American Retail Dealers Association / International Mobile Audio Video Retailers Association

For more information call [illegible]

EXHIBIT B